Supreme Court, U. S.
FILED
FEB 23 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1976

—o—

NO. 76-415

—o—

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

—o—

On Appeal from the Illinois Supreme Court

—o—

BRIEF FOR APPELLANT

—o—

J. Steven Beckett
Donald M. Reno, Jr.

Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois 61820

Counsel for Appellant

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

Subject Index

	Pages
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	3
Summary of Argument	7
1. The *Miller* Standards	11
2. Post-*Miller* State Court Decisions	17
3. Post-*Miller* State Legislative Action.	23
4. The Illinois Obscenity Statute.	27
5. *Hamling* Construction.	33
6. Obscenity *vel non* of Publications.	41
Conclusion	42

APPENDIX

A. Constitutional Provisions and Statutes Involved. A-1

TABLE OF AUTHORITIES CITED

CASES CITED

ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 (Miss., 1976) 8, 21

Barenblatt v. United States, 360 U. S. 109 (1959) 40

CASES CITED—Continued

Pages

Bloom v. Municipal Court for Inglewood J. D., etc., 16 Cal. 3d 71, 127 Cal. Rptr. 317 (1976) 19

Bouie v. City of Columbia, 378 U. S. 347 (1964) 16

Cohen v. California, 403 U. S. 15 (1971), reh. den. 404 U. S. 876 (1971) 2

Commonwealth v. Horton, 310 N. E. 2d 316 (Mass., 1974) 21, 23

Commonwealth v. McDonald, 347 A. 2d 290 (Pa., 1975) 22

Dahnke-Walker Mining Company v. Bondurant, 257 U. S. 282 (1921) 2

Eagle Books, Inc., et al. v. Reinhard, et al., 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), appeal pending as Reinhard v. Eagle Books, No. 76-366, 45 L. W. 3192 (9/10/76) 6, 7, 9 10, 30, 31, 32

Ginsburg v. United States, 383 U. S. 463 (1966) 34, 36, 38

Hamling v. United States, 418 U. S. 87 (1974) 10, 33, 34-36

Interstate Circuit v. Dallas, 390 U. S. 676 (1968) 14

Jenkins v. Georgia, 418 U. S. 153 (1974) 39

Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) 34, 36, 37, 38

McCright v. Olsen, 367 F. Supp. 937 (three-judge, D. N. D., 1973) 21

CASES CITED—Continued

Pages

Memoirs v. Massachusetts, 383 U. S. 413 (1966) 27

Miller v. California, 413 U. S. 15 (1973) 2, 6, 7, 8 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 23, 24, 25, 26, 27, 28, 29, 32, 33, 39, 40, 41

People v. Bloss, 394 Mich. 79, 228 N. W. 2d 384 (1975) 21

People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), cert. den. 418 U. S. 937 (1974) 8, 17, 18, 19

People v. Gould, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975) 29

People v. Heller, 33 N. Y. 2d 314, 307 N. E. 2d 805 (1973) 18

People v. Hume, Inc., 60 Ill. 2d 397, 327 N. E. 2d 329 (1975) 29

People v. Ridens (Ridens I), 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), vacated and remanded as Ridens v. Illinois, 413 U. S. 912 (1973) 27, 29

People v. Ridens (Ridens II), 59 Ill. 2d 362, 321 N. E. 2d 264 (1974), cert. den. 421 U. S. 993 (1975) 9, 28, 29

People v. Tabron, 544 P. 2d 372 (Col., 1976) 8, 21

People v. Ward, 25 Ill. App. 3d 1045, 324 N. E. 2d 205 (1975) 1

CASES CITED—Continued

Pages

People v. Ward, 63 Ill. 2d 437, 349 N. E. 2d 47 (1976), jurisdiction noted as Ward v. Illinois, — U. S. —, 45 L. W. 3453 (1/10/77) 2, 10, 30, 31, 32, 39

Pierce v. State of Alabama, 292 Ala. 473, 296 So. 2d 218, cert. den. 419 U. S. 1130 (1975) 8, 18

Price v. Commonwealth, 214 Va. 490, 201 S. E. 2d 798 (1974), cert. den. 419 U. S. 902 (1975) 18

Rhodes v. State, 283 So. 2d 351 (Fla., 1973) 17

Roth v. United States, 354 U. S. 476 (1959) 13, 32, 33, 34, 36, 39

Slaton v. Paris Adult Theater I, 231 Ga. 312, 201 S. E. 2d 456 (1973), cert. den. 418 U. S. 939 (1974) 17

State v. DeSantis, 65 N. J. 462, 323 A. 2d 489 (1974) 21

State v. Harding, 114 N. H. 335, 320 A. 2d 646 (1974) 8, 19, 20, 21

State v. Little Art Corp., 191 Neb. 448, 215 N. W. 2d 853 (1974) 26

State v. Shreveport News Agency, Inc., 287 So. 2d 464 (La., 1973) 21

State v. Wedelstedt, 213 N. W. 2d 652 (Ia., 1973) 8, 21

State v. Welke, 298 Minn. 402, 216 N. W. 2d 641 (1974) 8, 21

United States v. Hamling, 481 F. 2d 307 (1973) 34

United States v. Harriss, 347 U. S. 612 (1975) 17

CASES CITED—Continued

Pages

United States v. Reidel, 402 U. S. 351 (1971) 34

United States v. 12 200-ft. Reels of Film, 413 U. S. 123 (1973) 36

West v. State, 514 S. W. 2d 433 (Tex. Ct. Crim. App., 1974) 8, 18, 33

STATUTES AND CONSTITUTIONAL PROVISIONS

A. L. I. Model Penal Code, § 207.10 (2) (Tent. Draft 1957) 33

Annotated Laws of Massachusetts, Chapter 272, § 31 (1974) 24

Arizona Revised Statutes, § 13-531.01 (1974) 9, 23

Burns Indiana Statutes Annotated, Chapter 10.1, § 35-30-10.1-1 (1975) 24

California Penal Code, § 311 18

Code of Virginia, Article 5, § 18.2-373 and § 18.2-390 (1975) 24

Delaware Code Annotated, Title 11, § 1364 (1974) 9, 23, 24

General Statutes of North Carolina, § 14-190.1 (1973) 24

Georgia Code Annotated, § 26-2101 (1975) 24

Idaho Code, § 18-4101 (1976) 23

Illinois Revised Statutes, Chapter 38, § 11-20 ....2, 3, 4, 5, 7, 9, 10, 11, 27, 29, 39, 41, 42, A-1-A-4

Iowa Code Annotated, Chapter 725, § 725.1 (1974) 9, 26

STATUTES AND CONSTITUTIONAL PROVISIONS—Continued

Pages

Kentucky Revised Statutes, Chapter 531, § 531.010 (1974) 24

Louisiana Revised Statutes Annotated, Chapter 1, § 14:106 (1974) 9, 24, 25

Massachusetts General Laws Annotated, Chapter 272, § 28A 22

Nebraska Revised Statutes, Chapter 28, § 28-926.11 (1975) 24, 26

New York Penal Law (Consol.), § 235.00 (1974) 9, 24

North Dakota Century Code, Chapter 12.1-27.1, § 12-1-27.1-01 (1975) 24

Ohio Revised Code Annotated, Title 29, § 2907.01 (1975) 24

Revised Codes of Montana Annotated, § 94-8-110 (1975) 9, 26

South Dakota Compiled Laws Annotated, Title 22, § 22-24-27, et seq. (1974) 26

Tennessee Code Annotated, § 39-3010 (1974) 9, 23

United States Code, Title 18, § 1461 (1971) 33, 36

United States Code, Title 28, § 1257 (2) 2

United States Constitution, First Amendment 2, 3, 7, 11, 12, 14, 16, 17, 21, 26, 28, 32, 39, 41, 42, A-1

United States Constitution, Fourteenth Amendment 2, 3, 16, A-1

STATUTORY AND CONSTITUTIONAL PROVISIONS—Continued

Pages

Utah Code Annotated, § 76-10-1201 (1975) 24

Vernon's Texas Penal Code Annotated, Title 9, § 43.21 (1975) 9, 24

West Virginia Code, Article 8A, § 61-8A-1 et seq. (1974) 9, 26

In The

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal from the Illinois Supreme Court

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Appellate Court for the Third District of the State of Illinois was announced on February 20, 1975. It is reported at 25 Ill. App. 3d 1045, 324 N. E. 2d 205 (1975). A copy of this opinion is included in the printed Appendix at A. 27, 28.

The opinion of the Supreme Court of the State of Illinois was announced on May 14, 1976. It is reported at 63 Ill. 2d 437, 349 N. E. 2d 47 (1976). A copy of this opinion is included in the printed Appendix at A. 31-33.

—o—

JURISDICTION

In the proceedings below, the defendant, Wesley Ward, attacked the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. The Illinois Supreme Court specifically addressed itself to this issue and decided in favor of the validity of the statute. Jurisdiction of this issue is conferred by Title 28, United States Code, § 1257(2). *Cohen v. California,* 403 U. S. 15, 17, 18 (1971), (reh. denied, 404 U. S. 876 [1971]). *Dahnke-Walker Mining Company v. Bondurant,* 257 U. S. 282, 287-290 (1921).

—o—

QUESTIONS PRESENTED

1. Whether the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, as written and as construed by the Illinois Supreme Court, in light of the First Amendment standards announced by the United States Supreme Court in *Miller v. California,* 413 U. S. 15 (1973), is vague, indefinite, and uncertain, in violation of the free speech and press, and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the publication "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism," upon which defendant's conviction rests, are protected material under the First Amendment to the Constitution of the United States.

—o—

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, at the time of the commission of the alleged offense appear in Appendix A to this brief.

—o—

STATEMENT

On October 7, 1971, a single count complaint was filed in the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, charging the defendant, Wesley Ward, with violation of the state obscenity statute, Chapter 38, § 11-20, (a) (1), Illinois Revised Statutes. The complaint alleged that the defendant, through an employee, Elmer Stockman, had sold to the complainant, Officer Carl Tiarks, two obscene magazines, "Bizarre World", No. 1, and "Illustrated Case Histories, a Study of Sado-Masochism," Vol. 3, No. 1, at his bookstore in Peoria, Illinois (A. 3, 4).

The defendant filed his motion to dismiss, which alleged, *inter alia,* that Chapter 38, § 11-20 was unconstitutionally vague, indefinite and uncertain, and that the publications which were the subject of the obscenity charge were constitutionally protected (A. 5, 6). This motion was denied prior to trial (A. 7, 8).

The matter came for a hearing on the merits before the Honorable John A. Whitney, Associate Judge of the Peoria County Circuit Court, on March 23, 1972 (A. 7). The evidence adduced by the State was presented through the testimony of Carl Tiarks, the arresting officer. He stated that on February 12, 1971, he went into Wes Ward's Book Store located at 501 Southwest Adams Street, Peoria, Illinois at 1:30 in the afternoon (A. 9). At that time he purchased from an employee two magazines which he picked off a book rack. He paid the purchase price at the front register (A. 10, 11). The two magazines, as well as the sack in which they were placed after their purchase, were introduced into evidence (A. 10, 11).

On cross-examination Officer Tiarks testified that he entered the store on the date in question to obtain evidence for a possible criminal prosecution (A. 13). He further stated he was aware of the general physical premises of the store and had been by there in his squad car occasionally (A. 13). He had observed that the windows of the store were painted so that passersby could not see into the store from the street (A. 13). He also testified that on the date on which he purchased the publications he saw no persons under the age of 18 in the store at any time (A. 13). He indicated that the magazines he obtained were enclosed in cellophane at the time of the purchase

and that he purchased the magazines from an employee of the store, stating that the defendant Wesley Ward was not present in the store at the time (A. 14).

The State rested. The defendant presented a Motion for Directed Judgment at the Close of the State's Case in Chief (A. 14), which alleged *inter alia* that the state obscenity statute was unconstitutional and that the publications involved in the trial were entitled to constitutional protection (A. 15-17). The matter was taken under advisement (A. 14).

On April 4, 1972, the defendant's attorney and the assistant state's attorney stipulated that the defendant, Wesley Ward, was the active owner of the Wesley Ward Book Store, actively participated in the management of the store on February 12, 1971, and was responsible for and supervised purchasing, inventory control, and sales of the store (A. 18).

On April 4, 1972, Judge Whitney entered his order denying the defendant's motion for directed judgment of acquittal. Further, he convicted the defendant of the offense of obscenity as set forth in the complaint (A. 19).

On April 17, 1972, Judge Whitney sentenced the defendant to serve one day in the Peoria County Jail and fined him $200 and court costs (A. 20).

On May 8, 1972, the defendant filed a Motion for a new Trial or in the Alternative Motion for Judgment of Acquittal, alleging *inter alia* the unconstitutionality of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, and that the publications in issue were constitutionally protected as a matter of law (A. 21-23).

This motion was denied by written order of Judge Whitney on May 23, 1972 (A. 24). Thereafter, the defendant filed his Notice of Appeal and Præcipe for Record to take an appeal to the Illinois Appellate Court, Third District (A. 25, 26).

The Illinois Appellate Court affirmed the defendant's conviction on February 20, 1975, in a written opinion (A. 27, 28). The defendant filed a Petition for Leave to Appeal to the Illinois Supreme Court which was allowed on May 27, 1975 (A. 29).

The Illinois Supreme Court, in a unanimous written opinion authored by Justice Crebs, affirmed the defendant's conviction on May 14, 1976. In that opinion the court rejected the defendant's contention that the Illinois Obscenity Statute was unconstitutional for failure to meet the standards of specificity set forth in *Miller v. California*, 413 U. S. 15 (1973). The court also held that the publications in issue were not entitled to constitutional protection (A. 30-33).

In his petition for rehearing, filed on June 1, 1976, the defendant called the Illinois Supreme Court's attention to the fact that a three-judge federal court had been convened in the Northern District of Illinois in a cause entitled *Eagle Books, Inc. et al. v. Philip Reinhard et al.*, to consider the validity of the Illinois Obscenity Statute as previously construed by the Illinois Supreme Court. The memorandum opinion of Federal District Judge Joel Flaum was presented to the court as authority for granting defendant's petition for rehearing (A. 34, 35). On June 7, 1976, the defendant supplemented his petition for

rehearing by presenting to the court the decision in *Eagle Books, Inc. et al. v. Reinhard et al.* (now reported at 418 F. Supp. 345), which opinion held unconstitutional the Illinois Obscenity Statute for failing to meet the specificity requirements of *Miller v. California*, 413 U. S. 15. The defendant asserted this was persuasive authority to grant rehearing, reverse his conviction, and hold the state obscenity statute invalid (A. 36). The court on June 28, 1976, denied the defendant's petition for rehearing (A. 37).

The mandate of the Illinois Supreme Court was stayed pending review of the case by the United States Supreme Court (A. 38). The defendant filed his Notice of Appeal to this Court on August 13, 1976, together with a Notice of Filing and Request for Certification of the Record (A. 39-41).

—o—

SUMMARY OF ARGUMENT

1. In *Miller v. California*, 413 U. S. 15 (1973), this Court announced First Amendment standards under which states could regulate hard core sexually explicit obscene material. One of those standards, part (b) of *Miller*, requires that a state law, as written or authoritatively construed, give specific delineation of physical conduct, the description or representation of which, in material, may render it potentially obscene.

2. Since the decision in *Miller v. California*, many states have had the opportunity to review their obscenity statutes under the *Miller* principles. This has come about

both as a result of court action and legislative action. These courts have interpreted *Miller v. California* to allow a saving authoritative construction on a pre-existing obscenity statute where that state's prior decisions had already indicated the limitations on the statute's coverage. See for example, *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973); *Pierce v. State of Alabama*, 292 Ala. 473, 296 So. 2d 218 (1974); and *West v. State*, 514 S. W. 2d 433 (Tex. Ct. Crim. App., 1974).

Other states have ascertained that their prior decisions did not put limits on the type of material that could be proscribed under their obscenity statute. However, these courts adopted a specifying construction on their obscenity statute, giving it prospective effect only. *State v. Harding*, 114 N. H. 335, 320 A. 2d 646 (1974); *State v. Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974).

There are also state courts who after *Miller* have determined that their prior decisions gave no indication of the type of conduct to be covered by the obscenity statute. These decisions have also determined that it is not a proper judicial function to place a clarifying construction under part (b) of *Miller* on the statute. As a result, these courts have held the state obscenity statute unconstitutional. *People v. Tabron*, 544 P. 2d 372 (Col., 1976); *State v. Wedelstedt*, 213 N. W. 2d 652 (Ia., 1973); and *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123 (Miss., 1976).

3. New obscenity legislation has been enacted since the Court's decision in *Miller v. California* by many states. Some states have specifically delineated the type of sexual

conduct, under part (b) of *Miller*, in terms virtually identical to *Miller's* two examples of patently offensive conduct. See for example, Arizona Revised Statutes, § 13-531.01 (1974); Delaware Code Annotated, Title 11, § 1364 (1974); and Tennessee Code Annotated, § 39-3010 (1974). Other legislative enactments provide quite specific lists of defined physical sexual conduct under part (b) of *Miller*. See for example, Louisiana Revised Statutes Annotated, Chapter 1, § 14:106 (1974); New York Penal Law Consol.), § 235.00 (1974); and Vernon's Texas Penal Code Annotated, Title 9, § 43.21 (1975). Finally, some other states since *Miller* have enacted legislation under which the dissemination of sexually explicit material to adults is not criminally proscribed. See for example, Iowa Code Annotated, Chapter 725, § 725.1 (1974); Revised Codes of Montana Annotated, § 94-8-110 (1975); and West Virginia Code, Article 8A, § 61-8A-1 et seq. (1974).

4. In Illinois, since the Court's decision in *Miller v. California*, the Illinois Supreme Court has had multiple opportunities to address itself to the *Miller* construction issue. The court, however, has failed to place a proper construction on the statute. The court has ignored the question of whether or not prior Illinois decisions have limited the application of the statute, Chapter 38, § 11-20, Illinois Revised Statutes. See *People v. Ridens (Ridens II)*, 59 Ill. 2d 362, 371, 321 N. E. 2d 264, 270 (1974). Indeed, a dissenting Justice Davis in *Ridens II*, and a federal three-judge court in *Eagle Books v. Reinhard*, 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), in reviewing prior Illinois decisions concluded that no limiting construction had ever been placed on the statute.

The Illinois Supreme Court has stated that the Illinois Obscenity Statute meets the part (b) requirement of *Miller* because it proscribes conduct that "appeals to a prurient interest." *People v. Ward*, 63 Ill. 2d 437, 440, 441, 349 N. E. 2d 47, 48, 49 (1976). The federal three-judge court in *Eagle Books* held that the Illinois Supreme Court had not made a proper *Miller* construction. *Eagle Books v. Reinhard*, 418 F. Supp. at 350. The type of construction placed on the statute by the Illinois Supreme Court ignores the mandate of *Miller v. California* and the types of construction that have been placed on other state statutes since *Miller*.

5. *Hamling v. United States*, 418 U. S. 87 (1974) is not authority for arguing that the Illinois Supreme Court has adopted a proper course. Instead, that case demonstrates how prior court decisions can serve as predicators of the final authoritative construction that is adopted on a statute. In *Hamling*, the United States Supreme Court used prior cases to engraft the two patently offensive examples from *Miller* onto the federal obscenity statute. Since Illinois has no such prior decisions, *Hamling* merely points out the deficiencies with the construction adopted by the Illinois Supreme Court.

A specific construction placed on a state's obscenity statute is important because it allows a bookstore owner to compare materials he proposes to sell with a written statute and make an objective determination that there is a risk that material may be obscene. Without the objective standard there is not proper notice. A statute which lacks such an objective standard is unconstitutional under the dictates of *Miller v. California*, 413 U. S. 15 (1973).

6. The materials before the Court in this case, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" are marginal materials. They may or may not fall within the two *Miller* examples of patently offensive sexual conduct. However, there are no examples of patently offensive sexual conduct in Illinois. A review of the materials should demonstrate they are entitled to First Amendment protection.

In conclusion, the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, is unconstitutional because it is vague, indefinite and uncertain, in violation of the specificity requirements of *Miller v. California*. The defendant's conviction should be reversed and the statute held unconstitutional.

ARGUMENT

1. The Miller Standards.

Miller v. California, 413 U. S. 15 (1973), established new standards under which a state obscenity law was to be measured. These standards were not ordinary principles of law nor merely the rationale of a decided case. Indeed, in *Miller* the Court remanded the case to a California Appellate Court "for further proceedings not inconsistent with the *First Amendment standards* established by this opinion." *Miller v. California*, 413 U. S. at 37 (emphasis added). By pronouncing that its opinion had laid out "First Amendment standards", the Court was usher-

ing in a new era of constitutional litigation with respect to state obscenity statutes.

At the outset of its opinion the Court declared that its opinion would allow states to both "identify" and "regulate" obscene material. *Miller v. California,* 413 U. S. at 20. That identification and regulation was couched in these terms by the Court:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively constructed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
>
> *Miller v. California,* 413 U. S. at 24 (citations omitted, Court's footnote).

In this passage, the Court indicated that it is constitutionally permissible for a state to have a criminal obscenity statute provided certain First Amendment guidelines are followed. Under these guidelines, a statute as written or as authoritatively construed by a state court must specifically delineate the types of physical sexual

conduct that are patently offensive. The Court clarified this further by stating:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
>
> *Miller v. California,* 413 U. S. at 25.

The Court was concerned with the vagaries inherent in such a regulatory scheme. In passing on this point the Court noted:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."
>
> *Miller v. California,* 413 U. S. at 27.

The Court expressed hope that the new standard announced would remove the stresses placed on the state and federal court system by the obscenity issue. This hope was even more optimistically phrased because the Court's opinion in *Miller* represented the first occasion since *Roth*

v. United States, 354 U. S. 476 (1957), that "a majority of this Court has agreed to concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." *Miller v. California,* 413 U. S. at 29. Thus, the Court's decision in *Miller* can be characterized, for purposes of Wes Ward's case, as focusing on "First Amendment standards" that would identify "hard core" obscene material both for state law enforcement officers and for persons who might disseminate material dealing frankly with sexual matters. The *Miller* thesis, then, was that these First Amendment standards would be a viable solution to the "intractable obscenity problem." See *Interstate Circuit v. Dallas,* 390 U. S. 676 at 704 (Harlan, J., concurring and dissenting, 1968).

It has been nearly four years since these *Miller*-First Amendment standards were announced. While it cannot be said that the institutional stress referred to by the Court in *Miller* has been eased, subsequent events seem to support the Court's *Miller* thesis. A variety of state appellate court action and legislative action demonstrates not the ultimate soundness of this *Miller* thesis, which only a much greater passage of time can do; rather, they illustrate that the *Miller* concepts can deal with state obscenity statutes in a constitutional framework to bring about a system of uniform procedural and trial treatment of the obscenity question. This in turn allows diverse communities to make public judgments that specific sexually oriented material will be accepted or not accepted in those communities.

It is to be emphasized that the wisdom of the *Miller*-First Amendment standards is not under attack in this

case. Indeed, what is under attack is a single state's failure to embrace the *Miller* concepts and apply them to its own state obscenity statute, thereby rendering that statute unconstitutional and void. A review of some other state appellate court decisions and legislative efforts will place this latter contention in proper perspective.

In post-*Miller* decisions, state appellate courts have had to consider whether an "authoritative construction" could be made on their respective obscenity statute. The significant *Miller footnote* 6 (designated in the quotation from *Miller* in this brief at page 12, *ante,*) suggested that states prior to the Court's decision in *Miller* could have anticipated the wisdom of the specificity and fair notice requirements of *Miller.* That footnote also asserted that a state could accept the wisdom of the *Miller* court's judgment in a post-*Miller* authoritative construction. Footnote 6 provided:

> "See, *e. g.,* Oregon Laws 1971, c. 743, Art. 29, §§ 255-262, and Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, Act. 9, c. 12, pt. II, pp. 126-129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.
>
> "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. *See United States v. 12 200-ft. Reels of Film,* 413 U. S. at 130 n. 7."
>
> *Miller v. California,* 413 U. S. at 24.

A proper analysis of post-*Miller* activity requires an understanding of the alternatives available to state courts and state legislatures.

First, the question facing a state appellate court, normally the state's supreme court, after *Miller v. California,* 413 U. S. 15 (1973), would be whether or not prior state court appellate decisions had given specific direction or delineation about proscribed physical sexual conduct, the depiction or description of which could render material potentially obscene. If the answer to this question was in the affirmative, that state statute could constitutionally be construed to have embraced the *Miller* specificity outlined in part (b) of the *Miller* tripartite test. That statute then could be retroactively applied to pre-*Miller* conduct, that is, arrests and trials for dissemination of material prior to *Miller v. California.* However, if the answer to this query was negative, the state court would further have to determine whether it could place any type of construction at all on the state obscenity statute, or whether this would properly be a legislative function. If a construction engrafting specificity onto the statute were made, constitutional principles announced in cases such as *Bouie v. City of Columbia,* 378 U. S. 347 (1964), would prevent the retroactive application of that statute, as construed. If the court has not made a prospective construction of the statute, it would have no alternative but to hold the statute unconstitutional on the ground that, as written, the law violated standards of due process under the First and Fourteenth Amendments to the Constitution of the United States. A criminal statute, especially affecting First Amendment rights, must be carefully drawn to give a

reasonable man fair notice of the proscribed conduct. *United States v. Harriss,* 347 U. S. 612 (1954).

Either before or after judicial encounters with the obscenity statutory construction problem, a state legislature could, of course, adopt a new obscenity statute which in written statutory terms could embrace the *Miller* tripartite test and could further specifically define the "patently offensive sexual conduct", the depiction or description of which would render material potentially obscene. In addition, it would be within the state legislature's power to make the dissemination of sexually oriented material to consenting adults non-criminal. In other words, there is no constitutional mandate that a state must have a criminal obscenity statute for all purposes.

2. Post-Miller State Court Decisions.

Categorization of announced state court decisions, federal court decisions concerning state obscenity statutes, and state legislative enactments reveals that in most instances this projected outline of possibilities has been followed. In reviewing obscenity statutes in post-*Miller* decisions some state courts have looked to their own prior decisions and ascertained that those decisions gave a putative defendant notice of the specific type of physical sexual conduct that would be proscribed by the statute. Consequently, these states have placed a construction on their statute to bring it within the *Miller* First Amendment standards. *E. g. People v. Enskat,* 33 Cal. App. 3d 900, 909, 910, 109 Cal. Rptr. 433, 438, 439 (1973), cert. denied 418 U. S. 937 (1975); *Rhodes v. State,* 283 So. 2d 351, 354-359 (Fla., 1973); *Slaton v. Paris Adult Theater I,* 231 Ga.

312, 315, 316, 201 S. E. 2d 456, 459 (1973), cert. denied 418 U. S. 939 (1974); *Pierce v. State of Alabama,* 292 Ala. 473, —, 296 So. 2d 218, 221, 222 (1974), cert. denied 419 U. S. 1130 (1975); *People v. Heller,* 33 N. Y. 2d 314, 324-328, 307 N. E. 2d 805, 811-813 (1973); *West v. State,* 514 S. W. 2d 433, 441-448 (Tex. Ct. Crim. App., 1974); *Price v. Commonwealth,* 214 Va. 490, 493, 494, 201 S. E. 2d 798, 800 (1974), cert. denied 419 U. S. 902 (1975).

In *People v. Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), for example, the Court decided the specificity question of § 311 of the California Penal Code, that state's obscenity statute, in this manner:

> "[W]e hold that section 311 is to be applied in appellant's case as it has previously been construed, (and without eliminating the statutory requirement that an obscene work is one 'utterly without redeeming social importance') we pause but briefly with appellant's contention that section 311 has not been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. The contention is incorrect.
>
> "In requiring that obscene matter must go 'substantially beyond contemporary limits of candor in description or representation of such matters', the statute is substantially the same as the general *Miller* formulation which inquires 'whether the work depicts or describes, in a patently offensive way, sexual conduct'. *Miller* states that those matters must be 'specifically defined by the applicable state law'. Previous California cases have so limited section 311. Thus, it is clear that section 311 prohibits only 'hard-core pornography' (Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152), that nudity does not equate with obscenity and that 'no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene' (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal. Rptr. 575 at 579, 433 P. 2d 479 at 483), and that 'To constitute obscenity . . . the material must contain a graphic description of sexual activity' (People v. Cimber, 271 Cal. App. 2d Supp. 867, 869, 76 Cal. Rptr. 382, 383). Further, and with respect to material of similar character to that involved here, Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 stated with reference to a film depicting among other things, fellatio, sodomy and oral copulation that 'It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships . . .' (245 C. A. 2d at 826, 54 Cal. Rptr. at 181). The film was held to be obscene with[in] the meaning of section 311."

People v. Enskat, 33 Cal. App. 3d at 908-910, 109 Cal. Rptr. at 438-439. (footnotes omitted)

This particular construction was expressly approved by the California Supreme Court in *Bloom v. Municipal Court for Inglewood J. D., etc.,* 16 Cal. 3d 71, 79-81, 127 Cal. Rptr. 317, 322, 323 (1976).

Other states have made the determination that while a *Miller*-type construction can be placed on an obscenity statute, this construction should have prospective effect only because of fair notice problems to the defendant, in the decided case. In *State v. Harding,* 114 N. H. 335, 320 A. 2d 646 (1974), the court first made a *Miller*-type construction, as follows:

> "[I]t is important to bear in mind that the *Miller* court expressly stated that prosecutions will be limited to representation or depictions of 'patently offensive "hard core" sexual conduct.' Miller v. Cali-

fornia, 413 U. S. at 27, 93 S. Ct. at 2616. The Court gave two examples of the type of activity falling within this phrase: (1) 'Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated' and; (2) 'Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' *Id.* at 25, 93 S. Ct. at 2615. It is true that the qualifying phrases 'patently offensive' and 'lewd' do not precisely describe the activities banned by such examples. See 51 J. Urban L. 314, 321 (1973). Nevertheless, the thrust of the opinion is addressed to graphic representations or descriptions of (1) all forms of actual or simulated intercourse between humans or humans and animals in which the genitalis of one party is inserted into an orifice of another; (2) oral contact with the genitalia or manual contact with genitalia in a turgid state; (3) the insertion of any instrument or other device into the genital or anal passage in the course of activity designed to arouse or excite the genitalia; (4) the use of instruments or other devices by one party to inflict pain on another in the course of activity designed to arouse or excite the genitalia; or (5) the use of excrement or excretory functions in the course of activity designed to arouse or excite the genitalia; or (6) the genitalia in a turgid state. . . . [omitting citations] In our view these enumerated categories are sufficiently concrete to describe patently offensive 'sex' or 'sexual conduct' and to provide fair warning under *Miller* as to the scope of RSA 571-A:1 (Supp. 1972)."

State v. Harding, 114 N. H. at 341, 342, 320 A. 2d at 651.

The New Hampshire Supreme Court went on to discuss the views of dissenting justices on the United States Supreme Court about the failure of standards in the obscenity area to provide notice to potential defendants under obscenity laws. The New Hampshire Supreme Court thus stated:

> "The *Miller* opinion recognized this failure and stressed the need for specificity under state laws, as written or authoritatively construed. It is therefore not correct, as the State has urged, to say that the defendant had sufficient warning under the Roth-Memoirs test as to the obscene nature of the materials in issue. . . . [omitting citations] Under the circumstances of this case, we believe that it would be impermissible to subject the defendant to a trial on these issues in these cases."
>
> *State v. Harding,* 114 N. H. at 343, 344, 320 A. 2d at 652.

See also, *State v. Welke,* 298 Minn. 402, 406-413, 216 N. W. 2d 641, 645-649 (1974); and *State v. DeSantis,* 65 N. H. 462, 471-474, 323 A. 2d 489, 494, 495 (1974).

Other courts, upon review of certain state obscenity statutes under the *Miller* First Amendment standards, have concluded that the statute neither as written nor as previously construed by the respective state court meets the specificity requirements under part (b) of *Miller.* Accordingly, those courts, both state and federal, have held that certain state obscenity statutes are unconstitutionally vague. *People v. Tabron,* 544 P. 2d 372, 378-380 (Col., 1976); *State v. Wedelstedt,* 213 N. W. 2d 652, 656 (Ia., 1973); *State v. Shreveport News Agency Inc.,* 287 So. 2d 464, 468-470 (La., 1973); *Commonwealth v. Horton,* 310 N. E. 2d 316, 320-322 (Mass., 1974); *People v. Bloss,* 394 Mich. 79, 80, 228 N. W. 2d 384, 385 (1975); *ABC Interstate Theatres, Inc. v. State,* 325 So. 2d 123, 126, 127 (Miss., 1976); *McCright v. Olson,* 367 F. Supp. 937, 944, 945 (three-

judge, D. N. D. 1973); *Commonwealth v. McDonald*, 347 A. 2d 290, 295-299 (Pa., 1975). The rationale and decision of such cases is illustrated by the language of the Supreme Judicial Court of Massachusetts in reviewing the constitutionality of Massachusetts General Laws Annotated, Chapter 272, § 28A:

> "A review of our decisions indicates that we have not authoritatively construed § 28A in a way which has 'specifically defined' the sexual conduct whose portrayal is barred by statute. Certainly our decisions fall far short of the degree of definiteness appearing in statutes in Oregon and Hawaii, whose definition of prohibited conduct was at least qualifiedly endorsed in the *Miller* opinion *(supra,* 413 U. S. 24, fn. 6, 93 S. Ct. 2607). Our decisions also fall far short of the 'plain examples' given in the *Miller* opinion (see fn. 4 above). The most we have ever said was said in a negative way in a rescript opinion complying with what we viewed as the requirement of the Supreme Court of the United States. See Commonwealth v. Donahue, 358 Mass. 803, 262 N. E. 2d 589 (1970) ('[n]one of the pictures, however, explicitly portrayed copulation or other sexual congress'). See also Commonwealth v. Palladinoe, 358 Mass. 28, 32, 260 N. E. 2d 653 (1970), and Commonwealth v. Bitsocos, Mass. (1972), 281 N. E. 2d 227, for even more general characterizations in the same vein. The opinion in the *Donahue* case was not designed as an authoritative construction of our statute (G. L. c. 272, § 28A) so as to provide a definition of proscribed sexual conduct. The Court of Appeals for the First Circuit was correct in indicating in Literature, Inc. v. Quinn, 482 F. 2d 372, 375 (1973), that this court has not 'specifically defined' (see Miller v. California, *supra,* 413 U. S. at 24, 93 S. Ct. 2607) those activities which under § 28A may not be depicted or described. It is therefore clear that the opportunity is not fairly available to us, as it was in certain other States (see fn. 5 above), to conclude the constitutional requirements of specificity have been met by our decisions previous to the *Miller* decision.
>
> * * *
>
> "People are entitled to know what they may or may not do under the threat of imprisonment or fine. Our general obscenity statute does not furnish any guidance. As previously indicated, we decline to undertake the task of trying to list the specific sexual conduct whose display or description § 28A proscribes. To do so would constitute a judicial rewriting of that statute. Thus if there is to be regulation in the Commonwealth in the area of the sale or showing of pornographic works to adults, it must be achieved by explicit new legislation."
>
> *Commonwealth v. Horton*, 310 N. E. 2d at 321, 322.

3. Post-Miller State Legislative Action.

State legislatures have also responded to the Court's decision in *Miller*. Twenty-two state statutes have been enacted or amended since the Court's decision in June, 1973. The predominate change from pre-*Miller* statutes is a specific declineation or definition of physical sexual conduct under part (b) of the *Miller* tripartite test. Some such statutes delineate the proscribed sexual conduct in virtually the exact terms of the two "patently offensive" examples of *Miller*. *E.g.* Arizona Revised Statutes, § 13-531.01 (1974); Delaware Code Annotated, Title 11, § 1364 (1974); Idaho Code, § 18-4101 (1976); and Tennessee Code Annotated, § 39-3010 (1974). For example, Delaware's definition of obscenity contained in § 1364 of Title 11, Delaware Code Annotated, provides:

"Material is obscene if:

(1) The average person applying contemporary community standards would find the material, taken as a whole, appeals to the prurient interests; and

(2) The material depicts or describes:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and/or lewd exhibitions of the genitals; and

(3) The work taken as a whole lacks serious literary, artistic, political or scientific value. (11 Del. C. 1953, § 1364; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 236, § 1.)"

Other state statutes, enacted since *Miller*, provide for a more specific subset of defined physical sexual conduct, which can render material potentially obscene. Georgia Code Annotated, § 26-2101 (1975); Burns Indiana Statutes Annotated, Chapter 10.1, § 35-30-10.1-1 (1975); Kentucky Revised Statutes, Chapter 531, § 531.010 (1974); Louisiana Revised Statutes Annotated, Chapter 1, § 14:106 (1974); Annotated Laws of Massachusetts, Chapter 272, § 31 (1974), Nebraska Revised Statutes, Chapter 28, § 28-926.11 (1975); New York Penal Law (Consol.), § 235.00 (1974); General Statutes of North Carolina, § 14-190.1 (1973); North Dakota Century Code, Chapter 12.1-27.1, § 12-1-27.1-01 (1975); Ohio Revised Code Annotated, Title 29, § 2907.01 (1975); Vernon's Texas Penal Code Annotated, Title 9, § 43.21 (1975); Utah Code Annotated, § 76-10-1201 (1975); Code of Virginia, Article 5, § 18.2-372

and § 18.2-390 (1975). Louisiana, for example, in its post-*Miller* obscenity statute, provides:

"Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

(a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals or an animal and a human being; or

(b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva or female breast nipples; or

(c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or the condition of being fettered, bound or otherwise physically restrained, on the part of one so clothed; or

(d) Actual, simulated or animated, touching, caressing or fondling of, or other similar physical contact with, a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

(e) Actual, simulated or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured and marketed for such purpose.

Louisiana Statutes Annotated-Revised Statutes, Chapter 1, § 14:106, at page 201.

The last category of post-*Miller* obscenity statutes are those where the state has provided no criminal sanction for the dissemination of obscene material to consenting adults,

although there may be criminal proscription for dissemination to minors or non-consenting adults, in some instances. *E.g.* Iowa Code Annotated, Chapter 725, § 725.1 (1974); Revised Codes of Montana Annotated, § 94-8-110 (1975); South Dakota Compiled Laws Annotated, Title 22, § 22-24-27, et seq. (1974); West Virginia Code, Article 8A, § 61-8A-1 et seq. (1974). Such laws normally do not state in positive terms that the dissemination of obscene material to adults is permissible (although see West Virginia Code, Article 8A, § 61-8A-7). Rather, the statutes provide for criminal proscription only for distribution or exhibition of material to minors.

Although some state court decisions leave a great deal to be desired in terms of explaining why and how a certain construction has been adopted (see, for example, *State v. Little Art Corp.*, 191 Neb. 448, 451, 452, 215 N. W. 2d 853, 856 [1974]), the impact on the states' obscenity prosecutions could be minimized by the enactment of a new obscenity statute, which includes specific *Miller*-type definitions of physical sexual conduct (*e. g.* Nebraska Revised Statutes, Chapter 28, § 28-926.11). The difficulty that the instant case presents to the court is that Illinois has neither engrafted onto an existing statute the specific definition of proscribed physical sexual conduct, nor has enacted new legislation which contains that specific definition. Wesley Ward and those similarly situated with him, in Illinois, have not had the benefit of the *Miller* First Amendment standards.

4. The Illinois Obscenity Statute.

On March 21, 1972, just two days prior to the defendant's trial in Peoria County, the Illinois Supreme Court announced its decision in *People v. Ridens,* 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), (hereinafter referred to as *Ridens I*). *Ridens I* involved the construction of the Illinois Obscenity Statute, the same statute under which Wes Ward was charged. It defined obscenity as follows:

> "(b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in the description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs."
>
> Chapter 38, § 11-20, Illinois Revised Statutes.

In *Ridens I* the Illinois Supreme Court adopted the third element of the tripartite test set out by the plurality opinion in *Memoirs v. Massachusetts,* 383 U. S. 413 (1966), that to be obscene material had to be "utterly without redeeming social value." 51 Ill. 2d at 414, 282 N. E. 2d at 694.

Ridens I came to the United States Supreme Court by a petition for certiorari. The judgment of the Illinois Supreme Court was vacated and remanded for reconsideration after *Miller v. California,* 413 U. S. 15 (1973), as *Ridens v. Illinois,* 413 U. S. 912 (1973). On the remand, the Illinois Supreme Court again held the state obscenity statute constitutional, stating:

> "We need not and do not attempt to analyze the changes from the three-part *Roth-Memoirs* standard effected by the enunciation of the three-part *Miller* standard. It suffices to, and we now construe Section 11-20 of the Criminal Code . . . to incorporate parts (a) and (b) of the *Miller* standards."
>
> *People v. Ridens*, 59 Ill. 2d at 373, 321 N. E. 2d at 270. (Hereinafter referred to as *Ridens II*).

The court went on to reaffirm its belief that the third element in the test of obscenity, in Illinois, should remain "utterly without redeeming social value." *Ridens II*, 59 Ill. 2d at 373, 321 N. E. 2d at 270.

The Illinois Supreme Court, however, failed to address itself to the type of physical sexual conduct needed to be defined under part (b) of the *Miller* tripartite test. This occurred in spite of the fact that the Attorney General on behalf of the State of Illinois urged the court to consider prior decisions as having specifically limited the obscenity statute to cover only certain defined sexual conduct. The court made note of the Attorney General's argument, stating:

> "The People contend that, as 'heretofore authoritatively construed,' the obscenity statute, as required by *Miller v. California*, 'defines with particularity the kinds of specific sexual conduct which can be found obscene.' The People argue alternatively that if this court finds that the obscenity statute 'has not been previously construed to incorporate the *Miller* standard, the Court can and should now' so construe it."
>
> *Ridens II*, 59 Ill. 2d at 366, 321 N. E. 2d at 266.

In Ridens II, the court failed to give the statute the necessary specificity under the *Miller* First Amendment standards, stating instead:

> "We consider next whether the obscenity statute is impermissibly vague. Although not phrased in the exact language of *Miller*, the basic essential element of the statutory offense is that the material 'appeal to the prurient interest.' The statute specifically includes within the scope of 'the prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion.'"

Ridens II, 59 Ill. 2d at 371, 321 N. E. 2d at 269. Justice Davis, who had authored the opinion in *Ridens I*, dissented, noting that prior Illinois decisions had never given the Illinois Obscenity Statute the definitive type of construction needed under part (b) of *Miller*. Accordingly, his position was that the obscenity statute was void for vagueness and overbreadth. *Ridens II*, 59 Ill. 2d 375 at 379, 321 N. E. 2d 271 at 272, 273 (Davis, J. dissenting). A petition for certiorari to the United States Supreme Court was filed but denied, 421 U. S. 993 (1975).

Thereafter, the Illinois Supreme Court had two further opportunities to give the state obscenity statute the needed specificity. However, in neither *People v. Gould*, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), nor in *People v. Hume, Inc.*, 60 Ill. 2d 397, 327 N. E. 2d 329 (1975), did the court give a proper construction under part (b) of *Miller*. At this time, the defendant brought his case before the Illinois Supreme Court.

The defendant attacked the state obscenity statute on the *Miller* part (b) grounds. He asserted that the statute as written and previously construed did not contain a delineation of specific sexual conduct, the depiction or representation of which in material could potentially render it obscene.

In the opinion below the Illinois Supreme Court answered the defendant's contentions in this manner:

> "In *People v. Ridens,* 51 Ill. 2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia,* the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. *(Ridens v. Illinois,* 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. *(People v. Ridens,* 59 Ill. 2d 362, *cert. denied,* 421 U. S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or mobid interest in nudity, sex, or exeretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections."
>
> *People v. Ward,* 63 Ill. 2d at 440, 441, 349 N. E. 2d at 48, 49.

While Wes Ward's case was pending, a three-judge federal district court was convened in the Northern District of Illinois, in a cause entitled *Eagle Books, Inc. v. Reinhard,* 418 F. Supp. 345 (three-judge, N.D. Ill.,

5/28/76). Oral argument in the three-judge case was heard the same day the Illinois Supreme Court announced its decision in *People v. Ward.* See *Eagle Books v. Reinhard,* 418 F. Supp. at 350.

After reviewing the opinion of the Illinois Supreme Court in *People v. Ward,* the three-judge federal court held the Illinois Obscenity Statute unconstitutional. That court first noted that:

> "An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling* [418 U. S. 87 (1974)], but *Ridens II* did not. It remained after *Ridens II* for section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries* like the one in *Jenkins,* [418 U. S. 153 (1974)] who must apply the law to a set of facts."
>
> *Eagle Books v. Reinhard,* 418 F. Supp. at 349, 350 (court's emphasis).

After noting the quotation from the Illinois Supreme Court's opinion in *People v. Ward,* 63 Ill. 2d 437, 440, 441,

349 N. E. 2d 47, 48, 49 (1976), dealing with specificity, the federal court stated:

> "This court does not believe *Miller* can be properly construed as allowing the actual language of section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis' dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that section 11-20, as construed, is constitutionally invalid."
>
> *Eagle Books v. Reinhard,* 418 F. Supp. at 350.

Both the *Eagle Books* decision and the *Ward* decision were appealed to the United States Supreme Court. *Reinhard v. Eagle Books,* 76-366, appeal docketed 45 L. W. 3192 (9/10/76); *Ward v. Illinois,* jurisdiction noted, — U. S. —, 45 L. W. 3453 (1/10/77).

Defendant contends the rationale and holding of *Eagle Books v. Reinhard,* 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), should be accepted by this Court. The rationale of that decision simply stated is that while it may be difficult to define obscenity with "precision," it is constitutionally required that it be defined within the First Amendment standards pronounced by *Miller v. California,* 413 U. S. 15 (1973). Those First Amendment standards, and most importantly, the specificity under part (b) of those standards, cannot be said to have been met by reference to material that "appeals to a prurient interest." If that were true, then the Court's decision in *Miller* meant nothing, since that subjective definition of obscenity was first announced in 1957 in *Roth v. United States,* 354 U. S. 476 (1957).

The *Roth* opinion, in dealing with the concept of "prurient appeal" noted the definition of obscenity in

A. L. I. Model Penal Code, § 207.10 (), (Tent. Draft No. 6, 1957):

> "'• • • A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion . . . .'" *Roth v. United States,* U. S. at 487, n. 20.

Indeed, virtually all state statutes would need no modification or construction after *Miller* if the Illinois Supreme Court's rationale were accepted, since the standard "appeal to prurient interest", as set out in the *Roth* footnote, was in all state statutes prior to *Miller v. California,* 413 U. S. 15 (1973). The reference to a state court's construction "heretofore or hereafter" of state obscenity statutes in *Miller v. California,* footnote 6, 413 U. S. at 24, is rendered meaningless if the Illinois Supreme Court's position is accepted.

This Court did not define "authoritative construction" in *Miller.* See *West v. State,* 514 S. W. 2d 433, 444, n. 4 (Tex. Ct. Crim. App., 1974). Defendant submits that an authoritative construction is one in which prior judicial decisions have given notice that that type of construction might or could be adopted. *Hamling v. United States,* 418 U. S. 87 (1974), is a good example of such authoritative construction.

5. Hamling Construction.

In *Hamling v. United States,* the petitioners had been arrested, indicted and convicted under a federal obscenity statute, 18 United States Code § 1461, in 1971. Their convictions were affirmed by the Ninth Circuit Court of Appeals, including reaffirmation after consideration of *Miller*

v. California, United States v. Hamling, 481 F. 2d 307 (1973). A petition for certiorari was granted. In the Court's opinion, the petitioners' argument concerning the federal obscenity statute was recited to be as follows:

> "Petitioners next argue that prior to our decision in *Miller,* 18 U. S. C. § 1461 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller,* and therefore the section was unconstitutionally vague as applied to them in the prosecution of these cases."
>
> *Hamling v. United States,* 418 U. S. at 110, 111.

In rejecting this argument, the Court said:

> "Such an argument, however, not only neglects this Court's decisions prior to *Miller* rejecting vagueness challenges to the federal statute, but also fundamentally misconceives the thrust of our decision in the *Miller* cases."
>
> *Hamling v. United States,* 418 U. S. at 111.

The Court then referred to prior decisions in *Roth v. United States,* 354 U. S. 476 (1957); *Manual Enterprises, Inc. v. Day,* 370 U. S. 478 (1962); *Ginsburg v. United States,* 383 U. S. 463 (1966); and *United States v. Reidel,* 402 U. S. 351 (1971). The Court then stated:

> "At no point does *Miller* or any of the other obscenity decisions decided last Term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U. S. C. § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller,* 413 U. S., at 24 n. 6, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes 'as construed heretofore or hereafter, may well be adequate.' That recognition is em-

> phasized in our opinion in United States v. 12 200-ft. Reels of Film, 413 U. S. 123 (1973). That case had come to this Court on appeal from the District Court's dismissal of the Government's forfeiture action under 19 U. S. C. § 1305 (a), which statute the District Court had found unconstitutional. In vacating the District Court's constitutional decision and remanding the case to the District Court for a determination of the obscenity *vel non* of the materials there involved, we stated:
>
> > 'We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised" and "'a construction of the statute is fairly possible by which the question may be avoided.'" United States v. Thirty-Seven Photographs, 402 U. S. 363, 369 (1971) (opinion of White, J.), quoting from Crowell v. Benson, 285 U. S. 22, 62 (1932). If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see United States v. Orito, [413 U. S.,] at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California, [413 U. S.,] at 25. See United States v. Thirty-Seven Photograph, *supra,* 402 U. S. at 369-374, 91 S. Ct. at 1404-1407 (opinion of White, J.). Of course, Congress could always define other specific "hard core" conduct.' 413 U. S., at 130 n. 7.
>
> "*Miller* undertook to set forth examples of the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way,

413 U. S. at 25-26, and went on to say that no one could be prosecuted for the 'sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.' *Id.*, at 27. As noted above, we indicated in United States v. 12 200-ft. Reels of Film, *supra,* 413 U. S., at 130 n. 7, that we were prepared to construe the generic terms in 18 U. S. C. § 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California.' We now so construe the companion provision in 18 U. S. C. § 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained."

Hamling v. United States, 418 U. S. at 112-114.

The import of this lengthy quotation from the *Hamling* opinion is that prior decisions could give defendants notice of the direction the specific limitation on an obscenity statute could take. In the *Hamling* case, that prior direction came not only from *United States v. 12 200-ft. Reels of Film,* 413 U. S. 123 (1973), but from *Roth v. United States,* 354 U. S. 476 (1957); *Manual Enterprises v. Day,* 370 U. S. 478 (1962); and *Ginzburg v. United States,* 383 U. S. 463 (1966), among others. The Court's point is that the decisions of the United States Supreme Court, with respect to the federal obscenity statute, had been pointing towards a specific delineation of "hard core" sexual conduct. Thus, in *Manual Enterprises v. Day,* Justice Harlan stated:

> "[W]e find lacking in these magazines an element which, no less than 'prurient interest,' is essential to a valid determination of obscenity under § 1461, and

> to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged.
>
> "The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores.* While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of *United States v. Bennett,* 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth v. United States, supra,* at 489, 'taken as a whole appeals to prurient interest.' "
>
> *Manual Enterprises v. Day,* 370 U. S. at 482-484 (footnotes omitted, court's emphasis).

The phrase "obnoxiously debasing portrayals of sex" is significant since it indicates a limitation on the basis of sexual conduct. Later in his opinion in *Manual Enterprises v. Day,* Justice Harlan stated:

> "It is only material whose indecency is self-demonstrating and which, from the standpoint of its effect, may be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of § 1461."

Manual Enterprises v. Day, 370 U. S. at 487, 488 (court's emphasis).

Obscenity that is "self-demonstrating" is an objective standard, again limiting the subjective "appeal to the prurient interest test.

Then, in *Ginsburg v. United States,* 383 U. S. 463 (1966), Justice Harlan in a dissenting opinion stated:

> "I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only 'hardcore pornography.' "
>
> *Ginsburg v. United States,* 383 U. S. at 493 (Harlan, J. dissenting).

Although "hard core" material was never specifically defined by a majority of the Court, Justice Stewart in a footnote to his dissenting opinion in *Ginsburg v. United States,* 383 U. S. 463 (1966), stated with respect to "hard core" material:

> "' • • • Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material • • • cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. • • •' "
>
> *Ginsburg v. United States,* 383 U. S. at 500, n. 3 (Stewart, J., dissenting).

Thus, it can be seen that part (b) of the *Miller* First Amendment standards, and the two examples of patently offensive conduct given by the *Miller* majority, are a codification of "hard core" sexual conduct which evolved in the Court's decisions since *Roth v. United States,* 354 U. S. 476 (1957). Just as this type of authoritative construction was needed and given by the United States Supreme Court with respect to federal obscenity laws, state courts in cases after *Miller* were required constitutionally to adopt one of the three alternatives, previously discussed (see pages 17-23 *ante*), concerning state obscenity laws. Illinois has failed this *Miller* constitutional requirement.

In Illinois, the Illinois Supreme Court opinions, including *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976), are based on the statute and its definitions, as written. Realistically, Illinois has had no *Miller* construction placed on its obscenity statute. Defendant's past and future conduct, and others similarly situated with him in Illinois, has received no guidance about the specific contents of material available for sale in retail bookstores or for viewing in movie theaters. The First Amendment standards announced in *Miller* must be recognized to give Wesley Ward notice that his conduct could run afoul of a criminal statute. Instead, the Illinois decisions obscure the rationale underlying them, a vice of unconstitutional proportions. The Illinois Supreme Court concludes that the publications at issue here are obscene, and that they contain patently offensive sexual conduct, but the court does not say what that sexual conduct is. Because the court said the material was obscene, does not end the inquiry. See for example, *Jenkins v. Georgia,* 418 U. S. 153 (1974).

Part (b) of *Miller* is the objective portion of the tripartite test that gives notice to a disseminator of potentially obscene material. In other words, a bookstore owner should be able to take his magazines, or a theater owner his films, and compare their contents with the list of specified conduct delineated in the statute. If he finds the prohibited conduct depicted in the material he can then seriously evaluate the material's appeal to prurient interest, or lack thereof, and the materials literary, artistic, political, etc. value, or lack thereof. He can intelligently decide whether or not he runs the risk of criminal prosecution for disseminating obscene material. But without the objective delineation there can be no triggering mechanism—no chance to compare the material with the terms of the statute, as written or authoritatively construed, and no chance to make the decision concerning the risks of disseminating it.

These problems are magnified because while a disseminator may have problems with the vagaries of a statute, which may lead to self-imposed restraints on distribution (what the late Justice Black called "fear of a wrong guess", *Barenblatt v. United States*, 360 U. S. 109 at 137 [Black, J., dissenting, 1959]), law enforcement officials also have no objective guide as to what type of material may legitimately be prosecuted. Their activities in attempting to enforce the vague law lead to an even greater imposition of censorship. The end result is the arbitrary restriction of dissemination of ideas about sexual matters.

6. Obscenity vel non of Publications.

The statutory problem is emphasized in this case because of the marginal nature of the materials. The two publications at issue, which were certified for review to this Court, can be compared with no definitive listing of physical sexual conduct. Illinois has no such listing. Indeed one, "Bizarre World" in its pictorial portrayals and written articles has nothing that would fall within the "patently offensive" examples of *Miller*. The other publication, "Illustrated Case Histories, a study of Sado-Masochism," is marginal and may or may not fall within the two *Miller* examples. The defendant, however, had no opportunity to make an objective judgment about the materials in this case because the Illinois Obscenity Statute, as written, and as construed by the Illinois Supreme Court, has not met the specificity requirements of *Miller*. Moreover, a review of the publications at issue here demonstrates that they deserve First Amendment protection.

It follows that where the *Miller* standards have not been met, nor even addressed, a restraint of constitutionally protected materials is likely to occur. Thus, the very danger *Miller* and its standards seek to avoid is enhanced, in the instant case, by the omission of the Illinois Supreme Court in its obscenity decisions. The dim and uncertain line between protected speech and obscenity may or may not have been crossed, but a defendant such as Wes Ward is never informed until he has been convicted.

———o———

CONCLUSION

This Court in *Miller* has set First Amendment standards which in the Court's judgment allow a state to properly strike a balance between protected and non-protected materials that deal frankly with sexual matters. A statute, neither written nor authoritative construed in accordance with the *Miller* First Amendment standards, is by definition void for vagueness and is incapable of giving guidance in the constitutional sense. The Illinois Obscenity Statute suffers from this constitutional deficiency and the Illinois Supreme Court has refused to correct the problem. The Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, should be held unconstitutional and defendant's conviction reversed.

Respectfully submitted,

J. Steven Beckett and
Donald M. Reno, Jr.
Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois
Counsel for Appellant

APPENDIX A

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38—Criminal Law and Procedure 38 § 11-21

11-20. § 11-20. **Obscenity.)** (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, pic-

ture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it ap-

pears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.